95-1719

NO. _____

Supreme Court, U.S.
FILED
FEB 14 1996
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

JAMES E. DANIELS,
PETITIONER,
VS.
GREATER BALTIMORE MEDICAL CENTER, et al.,
AND
ROGER THEODORE, M.D.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

JAMES E. DANIELS
3558 CARRIAGE HILL CIRCLE
APT. #T-2
RANDALLSTOWN, MD 21133
(410) 655-0956

Pro Se Petitioner

9 9 ff

QUESTIONS PRESENTED

Whether the Fourteenth Amendment allows a state to enforce a final judgement obtained without personal jurisdiction over the petitioner, without correction of clerical mistakes, and without a hearing. As required by Maryland Civ. P 2-507(c), 4-621 and 7-208. Uniform application of the requirement of these rules to the appellate process is an important question of federal law which should be settled by this court.

Whether a State can require proof of a meritorious defense as a prerequisite to relief from a default judgement where every procedural rule designed to effect personal serve on the clerk of court and to notify all parties that judicial proceeding had been initiated was either violated or ignored, constitutes a violation of petitioner's due process rights resulting in a deprivation of its rights to have its case determined by a hearing.

PARTIES TO THE PROCEEDING

Petitioner in this action is James E. Daniels, an individual residing in Randallstown, Baltimore County, Maryland. Named as Respondent's below were Greater Baltimore Medical Center, a Maryland Corporation, and Roger Theodore, M.D., an individuals residing in the State of Maryland.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES iv
OPINION BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED 3
STATEMENT 5
THE QUESTIONS PRESENTED ARE SUBSTANTIAL . 9
CONCLUSION 20
APPENDICES 1a

TABLE OF AUTHORITIES

Cases ..... **Page**

Mathews V. Eldridge, 424 U.S. 319 (1976).....6

Jackson V. Jackson 260 Md. 138, 271 A.2d 690 (1970). 12

Hardy V. Hardy, 269 Md. 412, 306 A.2d 244 (1973) ... 12

Cromwell V. Ripley, 11 Md. App. 173 A.2d 218 (1971) 12

Maryland Abrams V. Gay Inc. Co., 253 Md. 121, 251 A. 2d 876 (1969) ..... 12 & 13

Maryland Nat'l Bank, 332 Md. 357, 631 A.2d 477 (1973) 11

Maryland Lumber Co. V. Savoy Construction Co., 286 Md. 98, 405 A.2d 741 (1979) 11

Gay Inv. Co. V. Angster, 231 Md. 318, 190 A.2d 95 (1963) 11

Barclay V. Florida, 436 U.S. 940 (1983) 19

Bass V. Hoagland, 172 F.2d 205 209 (5th Cir.), Cert denied, 369 U.S. 816 (1949) 19

Boddie V Connecticut, 401 U.S. 371 (1997) 15

Bryant Inc. V. Walters, 493 So.2d 933, 937 (Miss. 1986)13

Japan Line Ltd. V. County of Los Angeles, 441 U.S. 440-441 (1971) 3

Cohen V. California, 403 U.S. 15, 17-18 (1971) 3

TABLE OF AUTHORITIES - CONTINUED

Page

Waller V. Maryland Nat'l Bank, 333 Md. 373, 631 A.2d 447 (1993) 6

Wohl V. Wohlmuth, 340 F. Supp. 107 (D. Md. 1972) 6

Wohl V. Keene, 476 F.2d 171 (4th Cir. 1973) 6

Owl Club, Inc. V. Gothm Hotel, Ltd. 270 Md. 94, A.2d 534 (1973) 7

Eagle V. United States, 329 U.S. 304, 314 (1946) 10

Schwartz V. Thomas, 222 F.2d 305, 309§ D.C. Cir. (1995) 14

Gold Kist, Inc. V. Laurinburg Oil Co. 1756 F.2d 14 13

In the Marriage of Stromd, 631 P.2d 168 (Colo. 1981).. 13

Metivier V. McDonald's Corp. 449 N E.2d 1241 (Mass. App. 1983..... 13

Thomas P. Gonzler Corp. V. Conesjo National DeProducion DeCosta Rica, 614 F.2d 1247, 1256 (9th Cir. 1980)..... 13-14

Jordan V. Gilligan, 500 F.2d 701 (6th Cir.) Cert. denied 421 M.S. 991 (1974)..... 13

Chavez V. County of Valencia, 521 P.2d 1154 (N.Mex. 1974)..... 13

TABLE OF AUTHORITIES - CONTINUED

Page

Aguchak V. Montgomery Ward Co. Inc., 520 p.2d 1352, 1354 & n.5 (Alaski 1974) 14

Shannon V. Norman Block, Inc., 256 A.2d 214, 219 (R.I. 1969) 14

Morgan V. Atwell, 569 P.2d 529, 531 (Okla. App. 1977)14

Rain V. First Western Bank, 362 So. 2d 846, 848 (Ala. 1978) 14

Hengle V. Hyatt, 252 N.2d 105, 106 (Minn. 1977) 14

Pennoyer V. Neff, 95 U.S. 714, 732-33 (1878) 15

National Exchange Bank of Tiffin, Ohio V. Wiley, 195 U.S. 257,263 (1904) 15

Hanson V. Denckla, 357 U.S. 235, 250 (1958) 15

Kuklo V. Superior Court of California, 436 U.S. 84, 91 (1978) 15

Cleveland Board of Education V. Loudermill 470 U.S. 532, 543 (1985) 15

Coe V. Armour Fertilizer Worker, 237 U.S. 413, 424 (1915) 18

World-Wide Volkswagen Corp. V. Woodson, 444 U.S. 286 291 (1980) 17

TABLE OF AUTHORITIES - CONTINUED

Page

2-H Ranch Co., Inc. V. Spratt, 658 P.2d 68, 73 (Wy. 1883) 13

Fehlhaber V. Fehlhaber, 681 F.2d 1015, 1027 (5th Cir. 1882) 19

Lassiter V. Department of Social Service of Durham City, 452 U.S. 18, 33 (1981) 19

Other Authorities:

U.S. Const. Amend Passim
Md. Cts. & Jud. Proc. § 6-404 2,12
Md. R. Cia. P. 2-535 2,3,4,8,11,12,14,18
Md. R. Cia. P. 4-621 17
Md. Cts. & Jud. Proc. 7,16
Md. R. Cia. P. BY2 7
Md. R. Cia. P. 1-321 6,7,8
Md. R. Cia. P. 1-323 4,6,8
Md. R. Cia. P. 5-401 4
Md. R. Cia. P. 2-613 4

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully pray that a writ of certiorari issue to review the judgement of the court of appeals for Maryland in this case.

OPINION BELOW

The Court of Appeals of Maryland denied Daniels petition for Writ of Certiorari on

October 12, 1995. See App. A infra at 1a, and denied Daniels Motion for reconsideration

on December 15, 1995. See App. B infra at 2a. The opinion of the Court of Special

Appeals of Maryland affirmed the Circuit Court judgement on May 3, 1995, is unreported in

Daniels V. Greater Baltimore Medical Center, et al., NO. 1471, September Term, 1994. See App. C infra at 3a-13a. In granting Dr. Theodore's Motion to Dismiss on September 23, 1994, the Third Judicial Circuit of Maryland, concluded that Daniels failed to file timely an action to nullify the arbitrator's decision. See App. D infra at 14a-15a. Petitioner claim previously had been rejected by the Health Claims Arbitration Office on June 7, 1994. See App. E infra at 16a-26a.

JURISDICTION

Pursuant to Maryland R. Civ. P. 2-535 and Maryland Cts. & Jud. Pro. § 6-408, petitioner James E. Daniels, brought this, his Judicial Review "Review" in the Third Judicial Circuit of Maryland, seeking to vacate a final judgement entered against him by that court. See App. F infra at 27a-43a. Roger Theodore, M.D., Respondent therein moved for dismissal arguing that Daniels was not entitled to a review because he did not have a meritorious defense to the underlying action. Daniels responded by asserting that the review procedure, as it had been construed by the Courts of Maryland and as it applied to the facts of this case, violated the due process provision of the Fourteenth Amendment. [The Circuit Court decision has not yet been issued.]

Daniels raised the same argument in his appeal to the Court of Special Appeals for Maryland, but this Court declined to fined a constitutional violation. In his Petition for Writ of Certiorari to the court of Appeals of Maryland, Daniels again argued that he has a meritorious defense, proof, unrefuted evidence to meet the requirement, to vacate a final judgement; to deny him the opportunity to present this evidence as a prerequisite to vacating a final judgement violates the Fourteenth Amendment, Md. R. Civ. P. 5-401; See App. H infra at 52a-58a and App. C at 5a. The Court of Appeals of Maryland on October 12, 1995 denied Daniels Petition for Writ of Certiorari without

opinion and denied his Motion for Reconsideration on December 15, 1995, without opinion.

On July 5, 1994, Daniels mailed his Notice of Action to Nullify the decision rendered by the Arbitration panel to the clerk of court for Baltimore County within 30 days after the Arbitrator's decision was served upon him, July 7, 1994. See App. E infra at 16a-26a; and App. H infra at 52a-58a Daniels squarely challenged the constitutionality of the application of the Maryland R. Civ. P. 2-535(d)(b), Md. Cts. & Jud. Pro. § 6-408; to the facts of this case in each of the courts below, and each (with the exception of the court of appeals for Maryland, which issued no opinion) squarely upheld the validity of that rule. Jurisdiction of this court is invoked under U.S.C. § 1257 (a). See Japan Line Ltd. V. County of Los Angeles, 441 U.S. 434, 440-441 (1971); Cohen V. California, 403 U.S. 15, 17-18 (1971).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

U.S. Const. Amend. XIV, Section 1, provides:

No State shall make or enforce any Law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of Law; nor deny to any person within its jurisdiction the equal protection of the Laws.

Rule 2-613 (c),(d),(e) of the Maryland Rule of Civil Procedure Provides:

(c) **Motion by Defendant.** - The defendant may move to vacate the order of default within 30 days after its entry. The motion shall state the reasons for the failure to plead and the legal and factual basis for the defense to the claim.

(d) **Disposition of Motion.** - If the court finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action and that it is equitable to excuse the failure to plead, the court shall vacate the order.

(e) **Entry of Judgment.** - If a motion was not filed under section (c) of this Rule or was filed and denied, the court, upon request, may enter a judgment by default that includes a determination as to liability and all relief sought, if it is satisfied (1) that it has jurisdiction to enter the judgement and (2) that the notice required by section (b) of this Rule was mailed. If, in order to enable the court to enter judgment, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any matter, the court may rely on affidavits, conduct hearings, or order references as appropriate, and, if requested, shall preserve to the plaintiff the right of trial by jury.

Rule 2-535 (b) (d) of the Maryland Rule of Civil Procedure Provides:

(b) **Fraud, Mistake, Irregularity.** - On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.

(d) **Clerical Mistakes.** - Clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative, or on motion of any party after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed by the appellate court, and thereafter with leave of the appellate court.

Rule 5-401 of the Maryland Rule of Civil Procedure Provides:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 1-323 of the Maryland Rule of Civil Procedure Provides:

The clerk shall not accept for filing any pleading or other paper requiring service, other than an original pleading, unless it is accompanied by an admission or waiver of service or a signed certificate showing the date and manner of making

> service. A certificate of service is prima facie proof of service.

Maryland Code Ann. Ct. & Jud. Proc. § Jud. Proc. § 3-2A-01 (e) Provides:

> (e) **Health care provider.** - "Health care provider" means a hospital, a related institution as defined in § 19-301 of the Health-General Article, a physician, an osteopath, an optometrist, a chiropractor, a registered or licensed practical nurse, a dentist, a podiatrist, a psychologist, a licensed certified social worker-clinical, and a physical therapist, licensed or authorized to provide one or more health care services in Maryland. "Health care provider" does not mean any nursing institution conducted by and for those who rely upon treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination.

Maryland Code Ann. Ct. & Jud. Proc. § 3-2A-06 (a) (b) Provides:

> (a) **Rejection of award or assessment of costs.** - A party may reject and award or the assessment of costs under an award for any reason. A notice of rejection must be filed with the Director and the arbitration panel and served on the other parties or their counsel within 30 days after the award is served upon the rejecting party, or, if a timely application for modification or correction has been filed within 10 days after

a disposition of the application by the panel, whichever is greater.

(b) **Action to nullify award or assessment of costs.** - (1) At or before the time specified in subsection (a) of this section for filing and serving notice of rejection, the party rejecting the award shall file an action in court to nullify the award or the assessment of costs under the award and shall file a copy of the action with the Director. Failure to file this action timely in court shall constitute a withdrawal of the notice of rejection. Subject to the provisions of subsection © of this section, the procedures applicable to the action including the form and necessary allegations in the initial pleading shall be governed by the Maryland Rules. The Director need not be named a party of any action under this section.

Maryland Code Ann Ct. & Jud. Proc. § 6-408 Provides:

For a period of 30 days after the entry of a judgment, or thereafter pursuant to motion filed within that period, the court has revisory power and control over the judgment. After the expiration of that period the court has revisory power and control over the judgment only in case of fraud, mistake, irregularity, or failure of an employee of the court or of the clerk's office to perform a duty required by statue or rule. (1977, ch. 271.)

BY2 (a) of the Maryland Rule of Civil Procedure Provides:

> (a) Filling of Notice - Content.
> An action to nullify an award rendered by an arbitration panel determining a health care malpractice claim shall be commenced by filing notice of the action with the clerk of a court within 30 days after the award is served upon the party rejecting the award, or within ten days after disposition of a timely application to the panel to modify or correct the award, whichever is later. The notice shall identify the award and state that it is being rejected by the party filing the notice.

Rule 4-621 of the Maryland Rule of Civil Procedure Provides:

> Clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative, or on motion of any party after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed by the appellate court, and thereafter with leave of the appellate court.

Rule 1-321 (a) of the Maryland Rule of Civil Procedure Provides:

> (a) **Generally.** - Except as otherwise provided in these rules or by order of court, very pleading and other paper filed after the original pleading shall be served upon each

> of the parties. If service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivery of a copy or by mailing it to the address most recently stated in a pleading or paper filed by the attorney or party, or if not stated, to the last known address. Delivery of a copy within this Rule means: handing it to the attorney or to the party; or leaving it at the office of the person to be served with an individual in charge; or if there is no one in charge, leaving it in a conspicuous place in the office; or, if the office is closed or the person to be served has no office, leaving it at the dwelling house or usual place of abode of that person with some individual of suitable age and discretion who is residing there. Service by mail is complete upon mailing.

Rule 2-507 (b) of the Maryland Rule of Civil Procedure Provides:

> (b) **For Lack of Jurisdiction**. - An action against any defendant who has not been served or over whom the court has not otherwise acquired jurisdiction is subject to dismissal as to the defendant at the expiration of 120 days from the issuance of original process directed to that defendant.

Rule 7-208 (a) of the Maryland Rule of Civil Procedure Provides:

(a) **Generally.** - Unless a hearing is waived in writing by the parties, the court shall hold a hearing.

STATEMENT

This case arises out of Petitioner James E. Daniels' attempt to obtain relief from a final judgement entered against him in September, 1994.

During the period of time relevant to this appeal Roger Theodore, M.D., owned and operate a Health Care Business in the State of Maryland. On February 9, 1993, Daniels filed a complaint in the Health Claims Arbitration against Roger Theodore, M.D., alleged Medical Negligence and Lack of Informed Consent regarding a hemorrhoidectomy performed by Dr. Theodore on February 9, 1989. On November 9, 1989, Dr. Theodore examined Daniels and informed him that he still had a rectal skin tag which needed to be removed, that operation was performed on February 12,1990, this is further substantiated by the "affidavit of Roger Theodore, M.D., and the "affidavit of Suzanne Diamond." See App. I. Infra at 59a-64a. Dr. Theodore does not now and at no time did he ever, disputed the validity of Daniels claim.

On February 9, 1993, Daniels brought suit on the medical negligence and lack of informed consent in the Health Claims Arbitration Office for the State of Maryland. Pursuant to the Health Care Malpractice Claims Act. Md CJP § 3-2A-01 (e) certain claims against a health care

provider must be submitted to arbitration before an action is filed in the circuit court, Daniels mailed a copy of his rejection and his action to nullify the arbitrator's decision to the Director of the HCA; that document was [file stamp] received on July 7, 1994. See App. C infra at 5a and App. H at 52a-58a.

On July 6, 1994, the panel chairman, the attorney member of the panel also received a copy of the nullification notice. See App. H infra at 57a. On July 5, 1994, Daniels mailed Dr. Theodore a copy of the nullification notice. The document was sent via certified mail and delivery was made on July 7, 1994. See App. C infra at 5a and App. H at 58a. Daniels also mailed a copy of the notice to the clerk of the court for Baltimore County on July 5, 1994, that document was not received and filed until July 15, 1994, an obvious clerical error-thirty eight days after Daniels received notice of the panel's decision. Daniels had no reason to believe that anything was a miss until, September 23, 1994, the date of the circuit court judgement filed September 27, 1994. See App. D infra at 14a-15a. Under the Maryland Law, "clerical mistakes may be corrected at any time..." Maryland R. CIV. P. 4-621. Daniels nullification notice were served upon the clerk of court several days before the thirty days time limit for filing

the notice expired.[1] Md. R. Civ. P.1-321 and 1-323. App. H infra at 52a-58a. Waller V. Maryland Nat'l Bank, 332Md 375, 631 A.3d 447 (1993).

On September 23, 1994, a final judgement was entered against Daniels. In derogation of Md. R. Civ. P. 2-613(c)(d)(e). Daniels provided a certificate of service to the clerk of court with his notice nullifying the arbitrator's decision on July 5, 1994. Instead, as noted above the approved wording on the final judgement "as plaintiff failed to file notice of motion to appeal until July 15, 1994, will support the time requirement" the supplied language apparently intended to comply with Md. R. Civ. P. By 2a. Presumably because of the alleged failure to file timely an action to nullify the HCA decision, the record does not reflect that the clerk's office received or should have received the notice on or about July 7, 1994, as required by Md. Cts. & Jud. Pro. § 3-2A-06 (2)(b), and Md. R. Civ. P. BY 2.a. Daniels did in fact timely deposited in the United States mail with sufficient postage attached, a notice nullifying the HCA decision to the clerk of court as

certified on July 5, 1994, Md. R. Civ. P. 1-321, and 1-323. App. H infra at 52a-58a.

On August 5, 1994, Daniels filed a complaint in the circuit court alleging fraud, fraudulent concealment, and lack of informed consent. The complaint named Roger Theodore, M.D., and the Greater Baltimore Medical Center, et al., as respondents.

On September 23, 1994, the circuit court granted Dr. Theodore's motion to dismiss, on ground that Daniels service showed personal, but untimely, service was effected on the clerk of court, therefore, failing to file timely a notice of an action to nullify the arbitration panel's award, an obvious clerical mistake.

On May 15, 1995, Daniels brought his original review, return to the Notice of Intent to Appeal, Notice of Action to nullify, and Notice of Rejection of the HCA Award of Plaintiff "Return", and filed an Amendment to his return on December 15,1 995, seeking to set aside the final judgement on ground that the clerk of court was in fact had been personnel served and the judgement was therefore void under the Maryland Law, Md. R. Civ. P. 1-321, 1-

1

---

[1] As judgment in this case was entered in the circuit court on Dr. Theodore's motion to dismiss, all facts as presented by Daniels must be accepted as true and all reasonable inference drawn in his favor. See Wohl V. Wohlmuth, 340 F. Supp. 107 (D. Md. 1972), Wohl V. Keene, 476 F.2d 171 (4th Cir. 1973). In a direct attack on a final judgment such as this, under Maryland Law, no presumption arise out of service by mail. Md. R. Civ. P. 1-321(A). Daniels has establish fraud alleged to obtain the judgment sought by showing clear and convincing proof, unrefuted, that proper service was made. Owl Club, Inc. V. Gothm Hotels, Ltd 270Md.94, 310 A.2d 534 (1973).

323. See App. G. Infra at 44a-51a. Daniels proceeded in the circuit court for Baltimore County asserting that his review could be granted only where the petitioner showed a meritorious defense to which Daniels conceded that he have done. In his proceeding Daniels contended that the notice were served upon the clerk of court several days before the thirty days time limit for filing the nullification notice expired; that he has established a clerical mistake within the meaning of Md. R. Civ. P. 2-535(b)(d); that he has shown clear and convincing proof, unrefuted of the existing of the asserted mistake to entitle him to the relief sought; that he has demonstrated diligence, good faith, and a meritorious defense to this proceeding. Dr. Theodore did not dispute Daniels contentions other than to rely on the judgement reflecting service on July 15, 1994.

In the review proceeding the circuit court granted Dr. Theodore's motion to dismiss without opinion. Daniels has provided a meritorious defense to his cause of action in order to obtain the relief from the final judgement. The court of Special Appeals of Maryland, in a unanimous opinion by a three Judge panel affirmed the circuit court decision. On October 12, 1995, the Court of Appeals of Maryland denied Daniels' petition for a Writ of Certiorari. On December 15, 1995, the Court of Appeals denied Daniels' Motion for Reconsideration with substantial adverse consequences to the petitioner, this Appeal timely followed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal present important questions concerning the constitutionality of certain aspects of Maryland Law as they relate to obtaining and vacating final judgement. More specifically, it raises the question of whether a state can condition relief from a judgement obtained without correction of clerical mistakes and without an opportunity to be heard on the presence of an meritorious defense to the claim underlying the judgement. Maryland apparently is unique among the states imposing such a requirement, its rules is contrary to the Federal Rule and the Rule of several other jurisdiction. The Federal Rule, and the Rule of other states, allow for the vacation of a final judgement (i.e., one obtained without personal jurisdiction over the petitioner) at any time irrespective of whether the petitioner has a meretricious defense. I submit that these rules embody the constitutional imperative: no state may enforce a final judgement obtain without correction of clerical mistakes, without a hearing, and without personal jurisdiction over the petitioner, nor may it condition an individual's rights to obtain relief from such a judgment. This case calls upon the court to exercise its preeminent authority to guarantee that legislative and judicial pronouncements of the states conform with the Constitution.

A second question presented by this appeal is whether a court numerous violation of procedures designed to protect petitioner and insure fairness in the adjudication constitute a denial of due process. This court recognized in

Eagle V. United State, 329 U.S. 304, 314 (1946), that flagrant violations of procedural requirement which result in an unobtainable hearing can render the judgement subject to collateral attack. This case calls upon the Court to determine whether failure to correct clerical mistakes, and a failure to grant a hearing at every stage of a proceeding is procedural error of sufficient severity to render the ensuing judgement void.

1. Daniels has always contended that not only did he filed timely an Action to Nullify the HCA decision, but that he was never granted a hearing before the judgement was rendered against him. These contention were not converted on Motion to Revise Judgement, other than Dr. Theodore's reliance on the September 23, 1994, Court order.[2] Maryland Law provides three methods for a direct attack on a final judgement:

> (1) Motion for a new trial or other direct form of appeals, if filed within thirty days of the judgement;

2

---

[2] As noted above, Daniels contention that he served upon the clerk of court a timely notice of an action to nullify the HCA decision by depositing in the United States mail with sufficient postage attached on July 5, 1994; and that all parties to this action received a copy of the document on July 7, 1994, except the clerk of court; that document date stamped and entered on the docket July 15, 1994, an obvious clerical mistake. These facts must be considered as true for the purpose of this appeal, and under these facts, Daniels is entitle to absolute relief from the September 23, 1994, judgment. Under Maryland Law, within the meaning of Rule 2-535(b)(d), Daniels has proved that he is acting in good faith and with deligence, and that he has a meritorious defense. See Waller V. Maryland Nat'l Bank, 332Md. 357,631A2d477 (1973) and Maryland Lumber Co. V. Savoy Construction Co., 286Md.98, 405A.2d741 (1979).

> (2) Appeal by Writ of Certiorari if filed within thirty days of the final judgement; and
>
> (3) Judicial Review.

Gay Inv. Co. V. Angster, 231 Md. 318, 190 A.2d 95 (1963)

Because Daniels did not learned of the entry of the final judgement until September 23, 1994, he was forced to attack the final judgement in question by Judicial Review. As a general rule, a Maryland Judicial Review Plaintiff must plead and prove the following:

> (1) Meritorious claim or defense;
>
> (2) Which he has asserted by fraud, clerical mistakes or wrongful acts of the employee of the court ought or ought not be done within the meaning of Md. R. Cia. P. 2-535(B)(d);
>
> (3) Without any fault or negligence on his own part.[3]

Jackson V. Jackson, 260 Md. 138, 271 A. 2d. 690 (1970), and Hardy V. Hardy, 269 Md. 412, 306 A.2d 244 (1973)

Maryland court have required a Judicial review petitioner to show a meritorious defense to the underlying

---

[3] The court of appeal has recognized that final judgement may be revised where a violation of Md. Cts. & Jud. Proc. § 6-408 and Md. R. Civ. 2-535., result from the failure of either the court or the clerk's employee to perform a duty required by statute or rule.

final judgement, even where no personal jurisdiction has attached to him. In Cromwell V. Ripley, 11 Md. App. 173, 273 A.2d 218 (1971).

> Accordingly, we construe...Rule 2-535 et seq. to mean whether the court was satisfied that there had been shown a reasonable indication of a meritorious defense or other equitable circumstances that would justify striking the judgement...whether the court entertained a reasonable doubt that justice had not been done.[4]

Thus, in Maryland, a pleading that has not been file timely will shift the burden of showing any fraud, mistake or other irregularity to the petitioner, yet he will only be heard if he has a meritorious defense to the underlying claim. This is what the circuit court held, and in this the Maryland Court of Appeals found no reversible error.

In contrast, the Federal Rule, and the rule of several other jurisdiction, impose no limitation on a petitioner's ability to obtain relief from a final judgement. A Federal court has no discretion but to grant relief from a judgement obtained without personal jurisdiction over the petitioner. See Jordan V. Gilligan, 500 F.2d 701, 704 (6th Cir.), cert. denied, 421 U.S. 991 (1974); Gold Kist, Inc. V.

4

---

[4] More specifically, in Maryland Abrams V. Gay Inc. Co., 253 Md. 121, 251 A.2d 876 (1969), the Maryland Court of appeals held that proof of a meritorious defense was a prerequisite to relief even in cases of judgement void for want of personal jurisdiction. Into this category will fall those cases in which a final judgement is asserted to be void for want of service, or valid service, of process.

Laurinburg Oil Co., 756 F.2d 14,19 (3d Cir.) This rule apparently prevails throughout the country, and it has been explicitly adopted by several courts. See, e.g., Chavez V. County of Valencia, 521 P.2d 1154, 1158 (N. Mex. 1974) (no discretion on the part of a trial court but to grant relief where there is no subject matter jurisdiction); in re Marriage of Stroud, 631 P.2d 168, 170 n.5 (Colo. 1981) (a judgement is either void or not relief must be afforded accordingly); Bryant, Inc. V. Walters, 493 So.2d. 933, 937 (Miss. 1986) (void judgement must be vacated). See, also 2-H Ranch Co., Inc. V. Spratt, 658 P.2d 68, 73 (Wyo. 1983); Metivier V. McDonald's Corp., 449 N. E.2d 1241, 1243 (Mass. App. 1983).

Moreover, several courts have explicitly held that proof of a meritorious defense is not a prerequisite to obtaining relief from a final judgement. For example, the Ninth Circuit held in Thomas P. Gonzalez Corp. V. Consejo National De Production De Costa Rica, 614 F.2d 1247, 1256 (9th Cir. 1980).

> [There [is no] requirement, as there usually is when final judgements are attached under Rule 60(b), that the moving party show that he has a meritorious defense. Either a judgement is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.

Quoting C. Wright & A. Miller. Federal Practice & Procedures: Civil § 2862 at 197. See, also, Schwartz V.

Thomas, 222 F.2d 305, 309 § D.C. Cir. 1955); Aquchak V. Montgomery Ward Co., Inc., 520 P.2d 1352, 1354 & n.5 (Alaski 1974); Shannon V. Norman Block, Inc. 256 A.2d 214,219 R.I. (1969); Morgan V. Atwell, 569 P.2d 529, 531 (Okla. App. 1977); Rain V. First Western Bank, 362 So. 2d 846, 848 (Ala. 1978); Hengle V. Hyatt, 252 N.2d 105, 106 (Minn. 1977).

Of course there is no constitutional requirement that Maryland conform its rules of practice and procedure to the federal rule or the rules of the various other states, unless, as here, those rules themselves prescribed the constitutional minima. In this connection, the Fourteenth Amendment does proscribed the deprivation of litigation without correction of clerical mistakes and an opportunity to be heard and it is this proscription, properly embodied in the Federal Rules and the rules of other states, that Md. R. Civ. P.2-353(b)(d) infringes. For this reason, Maryland imposition of a "meritorious defense" requirement as a prerequisite to vacating a void judgement cannot withstand constitutional scrutiny.

It is axiomatic that the Fourteenth Amendment forbids the exercise of judicial power without correction of clerical mistakes and an opportunity to be heard. Pennoyer V. Neff, 95 U.S. 714, 732-33 (1878). This court has repeatedly held that a valid judgement imposing a personal obligation or duty in favor of a petitioner may be entered only by a court having jurisdiction over the person of the respondent. National Exchange Bank of Tiffin, Ohio V. Wiley, 195 U.S. 257, 263 (1904); Hanson V. Denckla, 357

U.S. 235, 250 (1958); Kulko V. Superior Court of California, 436 U.S. 84, 91 (1978). Daniels had neither a thoughtful opinion of the potential for correction of clerical mistake nor an opportunity to be heard before deprivation of litigation is the "root requirement" of Due Process Clause. Boddie V. Connecticut, 401 U.S. 371, 379 (1971).

Moreover, as this court recently emphasize in Cleveland Board of Education V. Loudermill
470 U.S. 532, 543 (1985), correction of clerical mistakes and an opportunity to be heard prior to the deprivation is necessary "even if the facts are not clear." Even though the facts of Daniels claim were clear, the final outcome of the litigation was anything but certain. Without proper hearing of the claim, he was deprived of further litigating his suit. He would have, and could have, done anything but let Dr. Theodore's motion to dismiss go to judgement and risk an end to his suit. Thus, he had a meritorious defense to the final judgement, he still had every reason to be heard and thereby forestall the immense loss he suffered through the September 23, judgement. As this Court stated in Coe V. Armour Fertilizer Worker, 237 U.S. 413, 424 (1915): The facts in Coe bear repetition insofar as Coe guides the instant case by way of similarly.

> To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merit.

This is no less true today than it was many years ago, and, accordingly, even if Daniels had no defense to the merit of the underlying action does not lessen his right to correction of clerical mistakes and an opportunity to be heard on that case.[5]

1. Finally, if rendering a judgement without correction of clerical mistakes violates the Fourteenth Amendment, restricting an individual's ability to attack that judgement must also violate the Fourteenth Amendment. A judgement rendered in violation of the Fourteenth Amendment to the constitution is void. World-Wide Volkswagen Corp. V. Woodson, 444 U.S. 286. 291 (1980). It is not entitle to enforcement in the rendering state or any other state. Hanson V. Denckla, 357 U.S. at 250 (1958). Since the constitution precludes a state from enforcing any such judgement, a fortiori no state can place condition on an individual's right to obtain relief from such a judgement.[6]

5 6

---

[5] Not only did Daniels have a meritorious claim at stake, but he was deprived of any further litigation of his claim. Without correction of clerical mistakes, and an opportunity to be heard, Daniels suffered the infamy of becoming a judgement default and the consequent loss of of a malpractice suit. For this reason, as well, MD Cts. & Jud. Pro. § 3-2A-06 is unconstitutional.

[6] The Court of Appeals below dismissed Daniels constitutional claim, holding that under the balance test of Matthews V. Elderidge, 424 U.S. 319 (1976), the requirement of showing a meriortious defense was "not onerous". This balance approach is, however, wholly inapposite. The minimum imperative of the Fourteenth Amendment is Notice and an opportunity to be heard before the deprivation take place. Balancing addresses whether a particular form of notice and hearing is adequate given the nature of the interest at stake. Matthew V. Eldridge is not instructive where, as here, there has been no correction of clerical mistake and an opportunity to be heard.

2. The number and breadth of procedural irregularities in the underlying judgement also constitute a denial of Daniels due process right. On the review Motion to Revise judgement, Daniels introduced an affidavit, See App. F infra at 30a-31a, in which he asserted: (1) that the clerk or employees of the clerk's being served with process; (2) that the clerk's office was given timely notice of his intent to appeal the arbitrator's decision, that Daniels deposited in the United States Postal Service with sufficient postage attached on July 5, 1994 to the clerk of court for Baltimore County his Notice of an Action to Appeal the panel's decision against him. The record in this case clearly shows that rule 4-621 of the Maryland R. Civ. P. was violated because Daniels alleged that all required documents had been served in a timely fashion Maryland R. Civ. P. 1-321 and 1-323 was violated when the final judgement was granted in this case as the circuit court could not properly enter a dismissal upon defective process. Rule 2-535(b)(d) was not complied with by either the clerk or the clerk's employees. In the underlying final judgement proceeding, the clerk failed to timely date stamp and enter on the docket as required by statute and rules Daniels' notice of intent to appeal the arbitrator's decision, served upon the clerk's office on July 5, 1994.

This court has held that procedural irregularities will result in the denial of due process where the defects are so unfair as to deprive the proceedings of vitality. Eagles V. United States, 329 U.S. at 314. Similarly, the Fifth Circuit has recognized that a combination of procedural error can

reach a level that rendered a judgement void for want of due process. Bass V. Hoagland 172 F.2d 205, 209 (5th Cir.), cert. denied, 338 U.S. 816 (1949); Fehlhaber V. Fehlhaber, 681 F.2d 1015, 1027 (5th Cir. 1882).

Also, this court has consistently stated that the Fourteenth Amendment require judicial proceeding to be conducted in a fundamentally fair manner. Lassiter V. Department of Social Service of Durham City, 452 U.S. 18, 33 (1981). Again, in 1983, this court stated that error in state law can rise to a level where they deprive an individual litigant of his federal constitutional rights. Barclay V. Florida, 436 U.S. 940, 956 (1983).

Certainly, the proceedings complained of here cannot be characterized as fundamentally fair where virtually every rule designed to inform a litigant that judicial proceeding have been initiated against him were violated or ignored.

CONCLUSION

For the foregoing reasons, probably jurisdiction should be noted.

Respectfully submitted,

James E. Daniels
3558 Carriage Hill Circle

Apt. T-2
Randallstown, MD 21133
(410) 655-0956

Pro Se Petitioner

March, 1996

APPENDICES

Appendix A

ORDER, SIGNED: August 12, 1995. ENTERED:

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 266, September Term,
1995 (No. 1471, September Term, 1994,
Court of Special Appeals)

JAMES E. DANIELS

VS
GREATER BALTIMORE MEDICAL CENTER, ET AL.

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals,
and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY
Chief Judge

Date: October 12, 1995

APPENDIX B

ORDER, SIGNED: December 15, 1995. ENTERED:

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 266, September Term, 1995 (No. 1471, September Term, 1994, Court of Special Appeals)

JAMES E. DANIELS

VS

GREATER BALTIMORE MEDICAL CENTER, ET AL.

ORDER

Upon consideration of the motion for reconsideration, filed in the above entitled case, it is this 15th day of December, 1995. ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

/s/ ROBERT C. MURPHY
Chief Judge

[Filed May 3, 1995]

APPENDIX C

Appeal from the Circuit Court for Baltimore County (Case NO. 94-CV-6539). Opinion delivered by Justice Bishop,
Davis and Hollander sitting.

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 1471, September Term, 1994

JAMES E. DANIELS

VS.

GREATER BALTIMORE MEDICAL CENTER, ET AL.

This is an appeal from an order of the Circuit Court for Baltimore County (Smith, J.) dismissing James E. Daniels' medical malpractice claim. The claim arose from an operation performed by Dr. Roger Theodore at the Greater Baltimore Medical Center. Appellant's claim previously had been rejected by the Health Claims Arbitration Office. In granting Dr. Theodore's motion to dismiss, the circuit court concluded that appellant failed to

file timely notice of an action to nullify the arbitrator's decision.

Appellant's proceeding pro se, presents two questions for our review. We restate those questions as a single issue:

> Did the trial court err by dismissing appellant's complaint for failure to file timely notice of the action?

FACTS

The pertinent facts may be stated briefly. On February 9, 1993, appellant James E. Daniels filed a claim with the Health Claims Arbitration Office (HCAO), alleging negligence and lack of informed consent in connection with an operation performed by Dr. Roger Theodore on February 9, 1989 at the Greater Baltimore Medical Center (GBMC). According to appellant, he gave his consent to an operation for the removal of a "rectal skin tag," but the operation performed by Dr. Theodore was, in fact, a herrohoidectomy.

Dr. Theodore filed a motion for summary judgment, which was granted on the ground that the three-year statute of limitations had expried. The arbitration panel concluded that there was no genuine dispute of material fact, and that appellant had actual notice of his cause of action on or before November 9, 1989. On that date, Dr. Theodore examined appellant and informed him that he still had a rectal skin tag which needed to be removed.

On June 7, 1994, appellant received notice of the decision and a copy of the panel's order.[1] On July 5, 1994, appellant mailed Dr. Theodore a document titled "NOTICE OF INTENT TO APPEAL, NOTICE OF ACTION TO NULLIFY AND NOTICE OF REJECTION OF AWARD." The document was sent via certified mail, and delivery was made on July 7, 1994. On July 7, the Director of the HCAO also received a copy of the document. According to appellant, he mailed a copy to the clerk of the Circuit Court

---

[1] The arbitrator's order is dated May 24, 1994. An amendment to that order, assessing costs against appellant, is dated May 31, 1994. The letter which accompanied the order is signed by the Director of the HCAO and is dated June 7, 1994. Although the record does not reveal the manner of delivery, appellant contends that he received notice on June 7, 1994.

for Baltimore County on July 15, 1994 -- thirty-eight days after appellant received notice of the panel's decision.

On August 5, 1994, appellant filed a complaint in circuit court alleging fraud, fraudulent concealment, and lack of informed consent. The complaint named Dr. Theodore and GBMC as defendants. On September 23, 1994, the circuit court granted Dr. Theodore's motion to dismiss, on the ground that appellant failed to file timely notice of an action to nullify the arbitration panel's award. This appeal followed.

LEGAL ANALYSIS

Pursuant to the Health Care Malpractice Claims Act (the Act), MD. CODE ANN. CTS. & JUD. PROC. (CJP) § 3-2A-01 et. seq., certain claims against a health care provider must be submitted to arbitration before an action is filed in circuit court. A claimant who intends to reject an arbitration panel's decision must comply with specific notice requirements. Those requirements are as follows:

> (a) Rejection of award or assessment of costs. - A party may reject an award or the assessment of costs under an award for any reason. A notice of rejection must be

> filed with the Director and the arbitration panel and served on the other parties or their counsel within 30 days after the award is served upon the rejecting party....
>
> (b) Action to nullify award or assessment of costs. - (1) At or before the time specified in subsection (1) of this section for filing and serving a notice of rejection, the party rejecting the award shall file an action in court to nullify the award or the assessment of the action with the Director. Failure to file this action timely in court shall constitute a withdrawal of the notice of rejection . . . . [T]he procedures applicable to the action including the form and necessary allegations in the initial pleading shall be governed by the Maryland Rules. . . .

CJP § 3-2A-06 (emphasis added). The statute is supplemented by Md. Rule BY2.a., which states that an action "shall be commenced by filing notice of the action with the clerk of a court within 30 days after the award is served upon the party rejecting the award . . ." Within thirty days after that notice is filed, the plaintiff must file and serve a complaint, setting forth the factual allegations which support the plaintiff's claim. Md. Rule BY4.a.1. See Ott v. Kaiser-Georgetown Health Plan, 309 Md. 641,

646 (1987) (explaining that an action to nullify is essentially a common law tort action, with the added element that the arbitration process must be completed).

Thus, a claimant wishing to bring an action nullifying an award rendered by the arbitration panel must:

> 1) File a notice of rejection with the Director of the HCAO and the arbitration panel within thirty days after being notified of the adverse decision;
>
> 2) File a notice of an action to nullify the award in circuit court within the same thirty-day period; and
>
> 3) File a complaint in circuit court within thirty days after notice of the action to nullify has been filed.

Each of those documents, of course, must be served on all opposing parties.

In Tranen v. Aziz, 304 Md. at 605 (1985) , the Court of Appeals concluded that compliance with the notice procedures "is a condition precedent to the maintenance of a court action."

The Court explained:

> The purpose of the legislative scheme is clear upon careful analysis. The notice of

> rejection serves as the final step in the arbitration procedure by which the award may be held non-binding and the claim held open for judicial resolution. The action to nullify, on the other hand, is the exclusive step by which the aggrieved party may initiate proceedings in court.

Id. at 612. Thus, the purpose of the notice requirement is not satisfied unless the claimant complies with each step of the notice procedure. The proper method for filing pleadings and other papers is governed by Md. RULE 1-32

Commentators have noted:

> A pleading or paper is filed by actual delivery to the clerk. This may be accomplished in person or by mail. However, the date of filing is the date the clerk receives the pleading, not the date when the pleading was mailed. Filing therefore differs from service of a pleading or paper by mail, which is, in fact, complete upon mailing. See Rule 1-321(a).

Paul v. Niemeyer and Linda M. Schuett, Maryland Rules Commentary at 35 (lst ed. 1984). See also Renehan v. Public Service Comm'n, 231 Md. 59, 63 (1963) (holding, under former Rule 1101.b.1., that an appeal from a decision by the Public Service Commission was not filed

until notice of appeal was actually received by the circuit court).

In the case at hand, the notice filed in circuit court was date stamped by the clerk on July 15, 1994. The pertinent docket entry likewise states that the notice was filed on that date. Appellant contends that copies of the notice "were served upon the clerk of the court" several days before the expiration of the notice period, and that the docket entry is "an obvious clerical error." As we noted in Jackson v. State, 68 Md. App. 679, 688-89 (1986), the docket entries are presumed to be correct unless and until they are corrected by the court in which the error occurred. See also Coleman v. State, 231 Md. 220, 222-23 (1963); Roberts v. State, 219 Md. 485, 488-89 (1959). Appellant's bare allegation that the notice was received by the clerk on July 5 is insufficient to rebut that presumption. Consequently, we must assume that the notice was received and filed on July 15, well beyond the thirty-day deadline. There is nothing to prevent appellant from requesting the circuit court to correct the error, if there is a provable error.

Appellant further contends that his actions were undertaken in a good faith effort to comply with the notice requirement, and that appellees suffered no prejudice. In effect, he suggests that his actions constituted substantial compliance with the notice requirements.

Under other circumstances, the Court of Appeals has held that substantial compliance with the notice requirement is sufficient. In Ott, 309 Md. 641, the claimant filed a one-page pleading in circuit court which did not comply with the requirements of Md. Rule BY4. Id. at 649. The Court of Appeals concluded that the defective pleadings were nonetheless in substantial compliance with the rule. The Court noted that all of the required documents had been served in timely fashion on the health care provider, and the provider could not have been misled about the claimant's rejection of his award or his intent to pursue a malpractice action against it. Id. at 652. See also Curry v. Hillcrest Clinic, 99 Md. App. 477, 495 (1994) (holding that a notice of rejection filed before the arbitration panel's decision was formally entered on the docket constituted substantial compliance); Wimmer v. Richards,

75 Md. App. 102, 113. cert. denied, 313 Md. 506 (1988) (holding that the notice requirement may be satisfied by substantial compliance, and remanding the case for pertinent factual findings).

The case before us is readily distinguished from those decisions. As we noted earlier, an action in circuit court is initiated by filing notice with the court pursuant to Md. Rule BY4. Section 3-2A-06(b)(1) provides that "[f]ailure to file this action timely in court shall constitute a withdrawal of the notice of rejection." When the legislature commands that something "shall" be done, and expressly provides a penalty for noncompliance, we must assume that the legislature meant precisely what it said. As we explained in Tucker v. Sate, 89 Md. App. 295 (1991):

> When a legislative body commands that something be done, using words such as "shall" or "must," rather than "may" or "should," we must assume, absent some evidence to the contrary, that it was serious and it meant for the thing to be done in the manner it directed.

Id. at 298. Accordingly, we hold that the thirty-day time limit for filing notice of an action to nullify the arbitration panel's award is mandatory rather than directory, and that strict compliance is required. The trial court did not err when it granted Dr. Theodore's motion to dismiss.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

[Filed September 27, 1994]

APPENDIX D

ORDER, SIGNED: September 23, 1994. Entered:

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

Case No. 94-CV- 6539

JAMES E. DANIELS,
PLAINTIFF,
VS.
GREATER BALTIMORE MEDICAL CENTER, ET AL.,
DEFENDANTS.

ORDER

Upon consideration of Defendant's Motion to Dismiss and the response by Plaintiff thereto, it is this 23rd day of September, 1994

ORDERED, that Defendant's Motion to Dismiss be, and it is hereby, GRANTED, as Plaintiff failed to file Notice of Intent to Appeal until July 15, 1994, well beyond the time required.

/s/ [illegible]

_____

Judge

TRUE TEST COPY
Suzanne Mensh, Clerk
/s/ [illegible]
per Saunders

Assistant Clerk

Copies to:

Roy L. Mason, Esquire
Natasha S. Wesker, Esquire
Mason, Ketterman & Morgan, P.A.
300 E. Lombard Street
Suite 1100
Baltimore, MD 21202

and

James E. Daniels
3558-T2
Carriage Hill circle
Randallstown, MD 21133

Filed Sep 27 1994

APPENDIX E

[State of Maryland Executive Department LOGO]

Health Claims Arbitration Office Harry L. Chase, Director
6 St. Paul Center, Suite 1501
Baltimore, Maryland 21202-1608
(41) 767-8200 1-800-492-1951
TDD (410) 333-3098
Fax (410) 333-6247

June 7, 1994

Mr. James E. Daniels
3558-T2 Carriage Hill Circle
Randallstown, MD 21133-

Mr. John R. Pennhallegon
100 Light Street
Suite 600
Baltimore, MD 21202-

Mr. Thomas S. Bouchelle
300 East Lombard Street
Suite 1100
Baltimore, MD 21202-

Re: HCA # 930061
Daniels vs. Greater Baltimore Center, etal

Dear Counsel:

In accordance with the provisions of the Health Claims aArbitration Act, I am enclosing herewith a copyh of the Arbitrators' findings in the above-captioned claim.

The Award of the penel is final and binding on all parties. Your APPEAL TIME IS 30 DAYS; THE REQUEST FOR MODIFICAITON TIME IS 20 DAYS, EACH BEING COMPUTED FROM THE DAY YOU RECEIVED THIS NOTICE.

If you have any questions, please do not hesitate to call this office.

Sincerely yours,

Harry L. Chase
Director

HLC/lz

Enclosure
cc: John Wheeler, Esq.

Law Offices of
Preston and Glenn, P.A.
The Law Building
425 St. Paul Place at Franklin
Baltimore, Maryland 21202

May 31, 1994

Mr. James E. Daniels
3558-T2 Carriage Hill Circle
Randallstown, Maryland 21133
and
Natasha S. Wesker, Attorney at Law
Mason, Ketterman & Morgan
300 East Lombard Street
Baltimore, Maryland 21202

RE: Daniels va. GBMC
HCA#: 93-0061

Dear Mr. Daniels and Ms. Wesker:

In my prior Order dated May 24, 1994, I omitted to make a ruling, as required by HCA regulations, as to accountability for costs at the Health Claims Arbitration level. Hence, you may accept this letter as an amendment of that Order.

Costs are hereby assessed against Claimant, in view of the Orders previously issued by the Panel Chair, dismissing both health care providers.

Very truly yours,

/S/[illegible]
John Wheeler Glenn

JWG/pab
cc: Health Claims Arbitration Office

RECEIPT FOR OFFICIAL MAIL
RECEIVED
[Illegible] 1, 1994
HEALTH
ARBITRATION OFFICE

May 31, 1994

Mr. James E. Daniels
3558-T2 Carriage Hill Circle
Randallstown, Maryland 21133
and
Natasha S. Wesker, Attorney at Law
Mason, Ketterman & Morgan
300 East Lombard Street
Baltimore, Maryland 21202

Re: Daniels vs. GBMC
HCA#: 93-0061

Dear Mr. Daniels and Ms. Wesker:

In my prior Order dated May 24, 1994, I omitted to make a ruling, as required by HCA regulations, as to accountability for costs at the Health Claims Arbitration level. Hence, you may accept this letter as an amendment of that Order.

Costs are hereby assessed against Claimant, in view of the Orders previously issued by the Panel Chair, dismissing both health care providers.

Very truly yours,

/S/[illegible]
John Wheeler Glenn

The arbitration costs in this case total $552.00

Approved by LAP

JWG/pab
cc: Health Claims Arbitration Office

Law Offices of
Preston and Glenn, P.A.
The Law Building
425 St. Paul Place at Franklin
Baltimore, Maryland 21202

May 24, 1994

Mr. James E. Daniels
3558-T2 Carriage Hill Circle
Randallstown, Maryland 21133
and
Natasha S. Wesker, Attorney at Law
Mason, Ketterman & Morgan
300 East Lombard Street
Baltimore, Maryland 21202

Re: Daniels vs. GBMC
HCA#: 93-0061

Dear Mr. Daniels and Ms. Wesker:

On May 23, 1994 oral arguments were held at my Baltimore office on the two pending Motions for Summary Judgment. You may accept this letter as the Order of the Panel Chair on those Motions.

1. Motion for Summary Judgment of Claimant

The Claimant, Mr. Daniels, in his Reply to the Motion for Summary Judgment filed by the health care provider, Theodore, likewise asserted that he was entitled to Summary Judgment. The filing of any such Motion by Mr. Daniels is inappropriate since by my prior scheduling Order,

not only way all discovery to be limited to the issue of limitations, but also, the Summary Judgement requested by Mr. Daniels seeks a complete determination in his favor of all issues of liability as opposed to merely a determination relative to the issue of limitations. But even if one were to assume that his Motion for Summary Judgement dealt solely with the issue of limitations, the same must be denied upon a finding by the Panel Chair, as more fully outlined in topic number 2, below, that uncontradicted evidence in this case indicates a probate date of knowledge by Mr. Daniels within the 3 year statute of limitations.

2. The Second Matter Before the Panel Chair is the Motion for Summary Judgment filed by the Health Care Provider, Dr. Theodore.

In preparation for oral argument, the Panel Chair reviewed appropriate portions of his file including the initial and Amended Complain filed by Claimant, the Order of the Panel Chair on the prior Motion to Dismiss, the Motion for Summary Judgment filed by Theodore, and the Reply filed by Mr. Daniels.

Initially, in the current posture of Summary Judgment, the Plan Chair must assume all facts contained in any documents offered with or in resistance to Summary Judgment, in the light most favorable to Mr. Daniels, the non-moving party. The Plan Chair may not consider any facts which were not contained in the documents attached to the Motion or Reply, such as the comments made by Mr. Daniels at oral argument. Further, the Chair must draw any inferences from facts, in the light most favorable to Mr. Daniels, and must resolve all issues of creditability in his favor.

Upon consideration of the above, the following facts are evident, based upon the materials omitted with the Motion and Reply: On February 9, 1989 Mr. Daniels was operated upon Dr. Theodore, the procedure being a hemorrhoidectomy; Daniels asserts that he only gave consent for the procedure to be the removal of a rectal skin tag on that date, and in his Affidavit attached to his Reply to the Summary Judgement request, the Claimant now asserts for the first time that he first gained actual knowledge of the fact that a hemorrhoidectomy was performed upon him on February 9, 1989, on the date of the second surgery, February 12, 1990. But without contradiction, the documents attached to the Motion for Summary Judgement suggest that on November 9, 1989 Mr. Daniels was seen at the office of Dr. Theodore, when Dr. Theodore discovered a rectal skin tag, and informed Mr. Daniels that the same was the cause of his current complaints, and that the same had to be removed. his deposition, Mr. Daniels admitted the essence of this event. Indeed, surgery was scheduled, but subsequently cancelled by Mr. Daniels, for a period of approximately 10 days after November 9, 1989. It should be noted that there is absolutely no denial nor contradiction of the events of November 9, 1989, within the Reply to the Summary Judgment request of Mr. Daniels, nor any document attached to his Reply.

Thus, the Panel Chair must conclude that there is no genuine dispute as to any material fact tat at least as of November 9, 1989, the Claimant knew, or should have known, that the procedure performed upon him on November 9, 1989, was <u>not</u> a rectal skin tag removal, but rather some other procedure as to which he gave no consent and which in fact, was a hemorrhoidectomy. Thus, pursuant to Maryland Courts and Judicial Proceedings, § 5-203, and § 5-109, three years would commence to run as of November 9, 1989, for the filing of a Complaint asserting fraudulent concealment

and lack of informed consent. But the original Complaint by Mr. Daniels was on February 9, 1993, after the three year statute of limitations would have expired from November 9, 1989.

Pursuant to Poffenberger v. Risser, 290 Md. 631 (1981) § 5-109 does not require that someone must, in fact, have informed Mr. Daniels that the wrong procedure was performed upon him, as related to the commencement of the statute of limitations, but rather, the Court of Appeals has ruled that the action must be commenced within 3 years from when the Claimant had "actual notice" of his cause of action. Actual notice includes knowledge f circumstances which would suggest to a reasonable person that they should investigate and ultimately discover whether or not a wrong had been committed upon them. Certainly, as of November 9, 1989, and as an uncontradicted event, Mr. Daniels as of that date informed that he had a rectal skin tag, which e asserts was supposed to have been removed on February 9, 1989.

Thus, there is no genuine dispute as to any material fact that Mr. Daniels knew, or should have known, as of November 9, 1989, that the procedure performed upon him in February, 1989, was not the removal of a rectal skin tag, but rather, some other procedure. Consequently, the Motion for Summary Judgement filed by the health care provider, Theodore, must be GRANTED.

Very truly yours,

/s/ John Glenn/pab

John Wheeler Glenn

Panel Chair

JWG/pab

cc: Harry Chase, Esquire
Director
Health Claims Arbitration Office

APPENDIX F

PETITIONER'S EXHIBITS

December 5, 1995

Suzanne Mensh, Clerk
Circuit Court For Baltimore County
County Court Building
401 Bosley Avenue
Towson, Maryland 21204-0754

Re: Daniels V. GBMC, et al., Case NO.: 94-CV-6539

Dear Ms. Mensch:

Enclose please fine for filing plaintiff's Amendment Motion to Revise Judgement, Memorandum in support of plaintiff's Amendment Motion to Revise Judgment, Affidavit in support of plaintiff's Amendment Motion to Revise Judgment and a request for a Hearing regarding the above captioned matter.

Thank you for your attention to this matter.

Very truly yours,

/s/ JAMES E. DANIELS
JAMES E. DANIELS

Enclosure

CC: Diane S. Deros, Esq.
Atty. for Theodore

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

Case No. 94-CV-6539

JAMES E. DANIELS,
PLAINTIFF,
VS.
GREATER BALTIMORE MEDICAL CENTER, ET AL.,
DEFENDANTS.

AMENDMENT MOTION TO REVISE JUDGEMENT

TO THE HONORABLE, JUDGE OF THE CIRCUIT COURT FOR BALTIMORE COUNTY, MARYLAND:

Now comes the plaintiff, James E. Daniels, pro se, and pursuant to Rule 2-535 (b)(d) and 2-341 (c) of the Maryland Rule of Procedure, moves this Court to Revise Judgement entered against this plaintiff on September 23, 1994, for the following reasons:

1. That there has been numerous and significant irregularities and mistakes in the manner in which the Judgement disposing of plaintiff's suit was entered against the plaintiff, as more fully set forth in the attached legal memorandum and affidavit.

2. Wherefore, the plaintiff, James E. Daniels, moves that this Court set aside the Judgement entered against him on September 23, 1994, on the grounds of clerical mistakes; showing by satisfactory proof (a) that he is acting in good faith, with ordinary diligence, and (b) that he has a meritorious defense or cause of action as the case may be, Md. Rule 2-535, (a) (b) and CJP § 6-408.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December, 1995, a copy of the aforegoing plaintiff's Amendment Motion to Revise Judgement was mailed to Ms. Diane S. Deros, Esquire, Mason, Ketterman & Morgan, P.A., 300 E. Lombard Street, Suite 1100, Baltimore, Maryland 21202.

/s/ JAMES E. DANIELS
JAMES E. DANIELS

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

Case No. 94-CV-6539

JAMES E. DANIELS,
PLAINTIFF,
VS.
GREATER BALTIMORE MEDICAL CENTER, ET AL.,
DEFENDANTS.

AFFIDAVIT IN SUPPORT OF PLAINTIFF MOTION TO REVISE JUDGEMENT

1. My name is James E. Daniels.

2. My address is 3558-T2 Carriage Hill Circle, Randallstown, Maryland.

3. I am the plaintiff in this case.

4. I have personal knowledge of this matter herein.

5. I am over eighteen (18) years of age and competent to testify.

6. I deposit in the United State Mail with sufficient postage attached a letter, Notice of Action to Nullify the HCA Award, to Ms. Suzanne Mensh, Clerk of the Circuit Court for Baltimore County, Maryland on July 5, 1994.

7. I did not know why, until a Court Order dated September 23, 1994, that my Nullification Notice was not entered on the Court Docket until July 15, 1994.

8. I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true.

/s/ JAMES E. DANIELS
JAMES E. DANIELS

Subscribed and Sworn to before me, a Notary Public, for the State of Maryland this 5th day of December, 1995.

[SEAL] Bonita R. Gatewood
Baltimore County, M.D.
Notary Public

/s/ Bonita R. Gatewood

NOTARY PUBLIC

MY COMMISSION EXPIRE OCTOBER 1, 1996.

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

Case No. 94-CV-6539

JAMES E. DANIELS,
PLAINTIFF,
VS.
GREATER BALTIMORE MEDICAL CENTER, ET AL.,
DEFENDANTS.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S AMENDMENT MOTION TO REVISE JUDGEMENT

I. BACKGROUND

On February 9, 1993, plaintiff, James E. Daniels, filed a claim with the Health Claims Arbitration Office (HCAO), alleging negligence and lack of inform consent in connection with an operation performed by Dr. Theodore on February 9, 1989 at the Greater Baltimore Medical Center (GBMC). Plaintiff gave his consent to an operation for a removal of a **"RECTAL SKIN TAG"** but the operation performed by Dr. Theodore was, in fact, a **HEMORRHOIDECTOMY.**

DR. Theodore filed a motion for summary judgement, which was granted on grounds that the three-year statute of limitation had expired. The arbitration panel concluded that there was no genuine dispute of material facts,

and that plaintiff had actual notice of his cause of action on or before November 9, 1989. ON that date, Dr. Theodore examined plaintiff and informed him that he still had a rectal skin tag which needed to be removed.

On June 7, 1994, plaintiff received notice of the decision and a copy of the panel's order.

SEE EXHIBIT A.

> The arbitrator's order is dated May 24, 1994. An amendment to that order, assessing cost against plaintiff, is dated May 31, 1994. The letter which accompanied the order is signed by the Director of the HCAO and is dated June 7, 1994.

On July 5, 1994, plaintiff mailed Dr. Theodore a document titled "NOTICE F INTENT TO APPEAL, NOTICE OF ACTION TO NULLIFY AND NOTICE OF REJECTION OF AWARD." The document was sent via certified mail and delivery was made on July 7 1994. **SEE EXHIBIT B.** On July 7, 1994, the Director of HCAO ALSO RECEIVED A COPY OF THE DOCUMENT. **SEE EXHIBIT C.** On July 6, 1994, the chairman, the Attorney member of the panel, also received a copy of the document. **SEE EXHIBIT D.** On July 5, 1994, plaintiff mailed a copy

of the document to the clerk of the circuit court for Baltimore County via depositing in the United States mail with sufficient postage attached; a Notice of Action to Nullify the HCA Award. That document was not entered on the docket until July 15, 1994 -thirty-eight days after plaintiff received notice of the panel's decision; an obvious clerical error. **SEE EXHIBIT C,** letter to Ms. Suzanne Mensh, circuit court clerk dated July 5, 1994.

On August 5, 1994, plaintiff filed a complaint in the circuit court alleging fraud, fraudulent concealment, and lack of informed consent. The complaint named Dr. Theodore and GBMC as defendants. On September 23, 1994, the circuit court granted Dr. Theodore's motion to dismiss, on ground that plaintiff failed to filed timely notice of action to nullify the arbitration panel's award. An appeal followed.

On May 15, 1995, plaintiff filed a motion for correction of clerical mistake under Maryland Rule 4-621, 2-535 (b)(d) and CJP § 6-408. The motion alleges that a letter had been sent via deposit in the United State mail with sufficient postage attached to the clerk of court for Baltimore County on July 5, 1994, as notice to the clerk that plaintiff

had rejected the HCA award in accordance with the Health Care Malpractice Claim Act; Md. Code Ann. Cts. & Jud. Proc. (CJP) § 3-2A-06. The statute is supplemental by Md. Rule BY2(a). **SEE EXHIBIT E.**

The Judgement must be vacated because it was obtained without the clerical error being corrected as required by CJP section § 6-408 (Revisory power of court over Judgement), Rule 4-621 (Correction of clerical mistake), and 1-321 (Certificate of service). Noncompliance with the aforemention statute or rule constitute significant irregularities and mistakes within the meaning of rule 2-535 (b)(d) requiring this court to revise judgement.

II. ARGUMENT

A. FAILURE OF AN EMPLOYEE OF THE COURT OR THE CLERK'S OFFICE TO COMPLY WITH MD. RULE 1-323, AND CJP § 6-408 CONSTITUTE IRREGULARITIES WITHIN THE MEANING OF MD. RULE 2-535 (b)(d).

Md. rule 2-535(b)(d) provides that a judgement enrolled more than (30) days may be revised upon proof of

fraud, mistake or irregularities. In addition, CJP 6-408 impose specific power upon the court that must be fulfilled before finality of judgement may be entered. CJP § 6-408 provides that:

> For a period of 30 days after the entry of a judgement, or thereafter pursuant to motion filed within that period the court has revisory power and control over judgement only in case of fraud, mistake, irregularities, or failure of an employee of the court or by the clerk's office to perform a duty required by statute or rule. (1977), ch. 271).

Md. rule 1-323 requires the clerk to properly perform duties required by statute or rules:

> The clerk shall not accept for filing any pleading or other paper requiring service, other than an original pleading, unless it is accompanied by \an admission or waiver signed certificate showing the date and manner of service is a prima facie proof of service.

The purpose of this rule is to prevent hardship which may result in fraud, mistake, irregularities, or failure of an employee of the court or of the clerk's office to perform a duty, timely. **SEE** Director of Finance of Baltimore City v.

Keith Harris, 9 Md. App. 506, 601 A. 2d 191 (1992). (dealing with a motion to strike default judgement vacated).

Despite plaintiff compliance with the specific Nullification requirement embodied in CJP § 3-2A-06 and Md. rule BY2.(a), the docket entry in the circuit court filed reflect that the nullification notice was received and filed by the court clerk on July 15, 1994. Thus, the court clerk failure to timely date stamp the nullification notice, clearly reflect that the docket entry is an erroneous.

A clerk's failure to (a) timely make entries on the docket and (b) failure to timely date stamped the notice of plaintiff is an "irregularity" and/or clerical mistake within the meaning of Md rule 2-535 (d)(b), requiring the court to exercise revisory power in case of fraud, mistake or irregularities. **SEE** ALABAN TRACTOR CO., V. WILLIFORD, 61 Md. App. 71, 484 A. 2d 103 (1984). An irregularity is usually defined as "the doing or not doing of that, in the conduct of a suit at law, which, conformable with the practice of the court ought or ought not be done." **SEE** BERWINE FUEL & FEED CO. V. V. KOLB, 249 Md. 475, 240 A. 2d 239 (1968). In this case, the court filed clearly

reflects an obvious irregularity and/or clerical mistake. Inasmuch as the July 15, 1994 docket entry was an clerical mistake pursuant to Md. rule 2-535 (b)(d), 1-323, 1-321 and CJP § 6-408, plaintiff supports proof of his admission by his sworn affidavit which states in fact that the nullification notice were served upon the clerk of court several days before the expiration of the notice period and that the docket entries is an obvious clerical mistake. The court must consider the error by the clerk's office, the denial of due process, and plaintiff's meritorious defense issues, as propounded in plaintiff's motion and affidavit, together, and revise judgement.

B. Noncompliance of an employee of the court OR THE CLERK'S OFFICE WITH MD. RULE 1-321 CONSTITUTE AN IRREGULARITY AND FRAUD WITHIN THE MEANING OF MD RULE 2-535 (b).

Md. rule 11-321 generally requires that every pleading and other paper filed after the original shall be served upon each of the parties. The rule provides in pertinent parts that:

...service by mail is complete upon mailing. An employee of the court or the clerk's office noncompliance with statutory requirement in failing to timely make docket entry may be deemed constrictive fraud. **SEE** BROKS V. MCMILLAN, 42 Md. App. 270, 400 A. 2d 436 (1997). (holding that the improper service, effect a constrictive fraud against petitioner).

In the present case, plaintiff contend that the untimely docket entry constitute "constrictive fraud." In addition, it was incumbent upon the employee of the court or of the clerk's office to timely docket plaintiff nullification notice filed within 30 days after being notified of the adverse decision, pursuant to CJP § 3-2A-06 and Md rule BY2.(a). Having failed to do, the employee of the court and of the clerk's office have committed an irregularity and constructive fraud against plaintiff within the meaning of rule 2-535(b), requiring the court to revise judgement. **SEE** COREY V. CARBACK, 201 Md 389,, 402, 210-11, 29 A. 2d 276 (1942). Also, cited in PARKER V. BERRYMAN, 174 Md 356 359, 198 A. 708 (1938).

III. CONCLUSION

Plaintiff entered his appearance pro se and asserted meritorious defense complying with the nullification notice requirement in his "Return" filed May 15, 1995, and this his Amendment Motion to Revise Judgement. An employee of the court or of the clerk's office who failed to perform a duty, untimely make a docket entry, as required by statute or rules, have committed an irregularity and constructive fraud against plaintiff within the meaning of Md rule 2-535(b) requiring the court to review judgement. Inasmuch as the aforementioned procedures were not performed, plaintiff has been denied due process and the opportunity to interpose or of the clerk's office to perform a duty required by statute and rules constitute significant irregularities within the meaning of Md rule 2-535 (b)(d) requiring the court to revise judgement.

For the foregoing reasons, plaintiff respectfully request that this court grant plaintiff's motion to revise judgement, and for such further relief as justice may require.

Respectfully submitted,

JAMES E. DANIELS, PRO SE
3558-T2 CARRIAGE HILL CIRCLE
RANDALLSTOWN, MARYLAND
21133
(410) 655-0956

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December, 1995, a copy of the aforegoing memorandum in support of plaintiff's amendment motion to revise judgment was mailed to Ms. Diane S. Deros, Esquire, Mason, Ketterman & Morgan, P.A., 300 E. Lombard Street, Suite 1100, Baltimore, Maryland 21202.

/S/ JAMES E. DANIELS
JAMES E. DANIELS, PRO SE

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

Case No. 94-CV-6539

JAMES E. DANIELS,
PLAINTIFF,
VS.
GREATER BALTIMORE MEDICAL CENTER, ET AL.,
DEFENDANTS.

REQUEST FOR A HEARING

Dear Sir/Madam clerk:

Plaintiff, James E. Daniels, respectfully request a hearing on plaintiff's motion to revise judgement.

Respectfully submitted,

/S/ JAMES E. DANIELS
JAMES E. DANIELS
3558-T2 Carriage Hill Circle
Randallstown, MD 21133
(410) 655-0956

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December, 1995, a copy of the aforegoing request for a hearing was mailed to Ms. Diane S. Deros, Esquire, Mason, Ketterman & Morgan, P.A., 300 E. Lombard Street, suite 1100, Baltimore, Maryland 21202.

/S/ JAMES E. DANIELS
JAMES E. DANIELS

APPENDIX G

PLAINTIFF EXHIBIT

May 15, 1995

Ms. Suzann Mensh
Clerk of court for
Baltimore County
401 Bosley Avenue
Towsen, Maryland 21204

RE: Daniels V. GBMC Case Nos: 94-CV-6539 and HCA Nos: 93-0061

Dear Ms. Mensh:

Enclosed for filing in the above reference case is plaintiff Return to the Notice of Intent to Appeal, Notice of Action to Nullify, and Notice of Rejection of the HCA Award to be reinstated.

Thank you for your attention to this matter.

Very truly yours,

/S/ JAMES E. DANIELS
JAMES E. DANIELS
3558-T2 CARRIAGE HILL CIRCLE
RANDALLSTOWN, Md 21133
(410) 655-0956

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

CASE NO. 94-CV-6539
HAC NO. 93-0061

RETURN TO THE NOTICE OF INTENT TO APPEAL, NOTICE OF ACTION TO NULLIFY AND NOTICE OF REJECTION OF THE HCA AWARD OF PLAINTIFF

In return to the Notice of Intent To Appeal, Notice OF Action To Nullify And Notice Of Rejection Of The HCA Award Of Plaintiff, the plaintiff would request from this Honorable Court, pursuant to Maryland Rule 2-535 (d) for an order to correct clerical mistakes or dismiss and/or deny the granting of Dr. Theodore's Motion To Dismiss plaintiff's Notice Of Intent To Appeal on grounds that plaintiff failed to file timely Notice Of Action To Nullify The Arbitrator's Award is erroneous and in support thereof states as follows:

1. That this is an action to correct clerical mistakes with reference to the filing date and docket entry of plaintiff Notice of Action to Nullify the Arbitrator's Award that was deposited in the **UNITED STATES MAIL WITH SUFFICIENT POSTAGE AFFIXED** to the clerk of Court for Baltimore County on July 5, 1994 (SEE EXHIBIT A PAGE 1-3).

2. That on July 5, 1995, plaintiff mailed to Mr. Harry L. Chase, Esq., the Director of the HCAO a single document titled, "NOTICE OF INTENT TO APPEAL, NOTICE OF ACTION TO NULLIFY AND NOTICE OF REJECTION THE HCA AWARD." The document was received by him and date stamped on [July 7, 1994] (SEE EXHIBIT B PAGE 1-7 AT 2 AND EXHIBIT A FOR DATE STAMPED).

3. That on July 5, 1994, plaintiff mailed to counsel for Dr. Theodore a single document title "NOTICE OF INTENT TO APPEAL, NOTICE OF ACTION TO NULLIFY AND NOTICE OF REJECTION OF THE HCA AWARD." The document was sent via certify mail, and delivery was made on [July 7, 1994] (SEE EXHIBIT C AND EXHIBIT A PAGE 1-7 AT PAGE 2).

4. That on July 5, 1994, plaintiff mailed to Mr. John W. Glenn, Esq., the HCA Arbitrator a single document titled "NOTICE OF INTENT TO APPEAL, NOTICE OF ACTION TO NULLIFY AND NOTICE OF REJECTION OF THE HCA AWARD." The document was received by him and date stamped on [July 7, 1994] (SEE EXHIBIT D).

5. That on July 5, 1994, plaintiff deposited in the **UNITED STATES MAIL WITH SUFFICIENT POSTAGE AFFIXED** to the Clerk of Court for Baltimore County within 30 days after being notified of the Arbitrator adverse decision by letter from the Director of the HCAO dated June 7, 1994, a single document title "NOTICE OF INTENT TO APPEAL, NOTICE OF ACTION TO NULLIFY AND NOTICE OF REJECTION OF THE HCA AWARD." It appears that that document was received and filed by the clerk's office on July 15, 1994, date stamped and entered on the docket by the clerk on the same date (SEE EXHIBIT E).

6. That on June 7, 1994, plaintiff received a letter 6) attached to that letter was the Arbitrator's order dated May 24 and amended on May 31, 1994. The letter announced the time period for an appeal " within 30 days...Each being computed from the day you receive this notice." This was accomplished by mail to the clerk of Court for Baltimore County and to all other parties to this matter on July 5, 1994. All parties received the notice on

[July 7, 1994] excepted the Clerk of Court until July 15, 1994.

7. Delays between the signing of an order by the trial judge and the entry of that order on the docket by the clerk are commonplace. For example, in this very case, judge Smith's order of September 23, 1994 was not filed until September 27, 1994. Plaintiff respectfully submit that rule 8-602 (c) is intended to address that problem, which really amount to delays in the clerk's office. It is intended to permit appeals where the trial court has already rule.

8. Plaintiff respectfully submits that the Maryland Rule of procedure clearly does not preclude plaintiff appeal under the facts of this case. Rule 8-602 (c) merely operates to permit the Circuit Court to rule in the face of a untimely appeal, and rule 8-602 (d) applies to situation in which there is a delay between service of the notice by mail and the filing date and its entry on the docket.

9. By order dated September 23, 1994 the circuit court granted Dr. Theodore's MOTION TO DISMISS " as plaintiff failed to file a notice of intent to appeal until July 15, Notice of Action to Nullify the Arbitrator's award which

is a clerical mistake that should be cured by the filing of this subsequent notice of appeal.

10. That the facts and circumstances as they exist herein demonstrates that the judgement sought to be vacated was obtained as a result of mistakes. Plaintiff respectfully submit that he have demonstrated to this Honorable Court clear and convincing proof of the existence mistakes. See Tasea Inv. Corp. v. Dale, 222 Md 474 160 A. 2d 920 (1960) and Bowen v. Rohanacher, 266 Md 742 (1972). It seem clear from a review of these cases that they was designed to let the circuit court know that such judgement is appealable.

11. That it is plaintiff understanding in order to seek an appeal, he must pursue the proper mode of prosecuting the appeal in order to obtain it. It would appear from the facts and circumstances exist herein that plaintiff has complied with all the provision of Maryland Rule for properly filing his Notice of Intent to appeal the HCA Award on July 5, 1994, within 30 days from the Director's of the HCAO letter dated June 7, 1994, Md Rule 8-201 and 8-202.

12. That by public record in the HCAO for the state of Maryland, plaintiff have a interest in this matter and

would suffer irreparable harm by the continuance of these mistakes,.

13, Pursuant to Maryland Rule 8-301 (a)(3), plaintiff is seeking a review in the court of appeal.

In view of the above facts, it is requested that the clerical mistakes be corrected and that the court order of dismissal dated September 23, 1994, be rescinded. It is further requested that plaintiff appeal be reinstated.

Respectfully submitted,

/S/ JAMES E. DANIELS
JAMES E. DANIELS

JAMES E. DANIELS, PRO SE
3558-T2 CARRIAGE HILL CIRCLE
RANDALLSTOWN, MD 21133
(410) 655-0956

CERTIFICATE OF MAIL

I HEREBY CERTIFY, that on this 15th day of May, 1995, a copy of plaintiff's Return to the notice of Intent to Appeal, Notice of Action to Nullify and Rejection of the

HCA Award was mailed, first-class, postage prepaid to Roy L. Mason, Esq., and Natasha S. Wesker, Esq., 300 E. Lombard Street, Suite 1100, Baltimore, Md 12102, Attorneys for Roger Theodore, M.D.

/S/ JAMES E. DANIELS
JAMES E. DANIELS

APPENDIX H

PLAINTIFF EXHIBIT

July 5, 1994

RECEIPT FOR OFFICIAL MAIL
JULY 7, 1994
RECEIVED
HEALTH CLAIMS
ARBITRATION OFFICE

Ms. Suzanne Mensh
Clerk
Circuit Court For Baltimore County
401 Bosley Avenue
Post Office Box 6754
Towson, Maryland 21204

RE: Daniels VS. Greater
Baltimore Medical
Center, et al., HCA No.: 93-0061

Dear Ms. Mensh:

I have enclose for filing plaintiff, Notice of Intent to Appeal, Notice of Action to Nullify and Notice of Rejection of Award with regard to the above captioned matter.

Thank you for your assistance in this matter.

Very truly yours,

/S/ JAMES E. DANIELS
JAMES E. DANIELS
3558-AT2 Carriage Hill Circle
Randallstown, Maryland 21133
(410) 655-0956

Enclosure

cc: Natasha S. Wesker, Esq.
Harry Chase, Executive Director.,
HCA
John W. Glenn, Esq. Panel Chairperson.
(W/enclosure)

RECEIPT FOR OFFICIAL MAIL
[FILE STAMP]
RECEIVED
JULY 7, 1994
HEALTH CLAIMS
ARBITRATION OFFICE

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

HAC NO. 93-0061

JAMES E. DANIELS,
PLAINTIFF

VS.

GREATER BALTIMORE MEDICAL CENTER, ET AL.,
DEFENDANTS.

NOTICE OF INTENT TO APPEAL, NOTICE OF ACTION TO NULLIFY AND NOTICE OF REJECTION OF THE AWARD

NOW COME the plaintiff, James E. Daniels, Pro Se, pursuant to the Maryland Code Title 3, Subtitle 2A-06 (a) and (b) of the court and Judicial Proceeding Article, appeal from the order of the panel chair, John Wheeler Glenn, Esquire, dated May 24, 1994..

1. That the plaintiff hereby filed this Notice to Nullify and Notice of Rejection of The Award by the HCA, dated May 24, 1994, to the circuit court for Baltimore County, shall be filed on or before July 7, 1994, requesting that this court review this matter on the merits.

Now therefore, and based on the foregoing, the plaintiff has complied with the Md. Cts. and Jud. Proc. Code Ann., §3-2A-06 as may be appropriate under this article.

Respectfully submitted,

/s/ JAMES E. DANIELS
James E. Daniels
3558-AT2 Carriage Hill Circle
Randallstown, Maryland 21133
(410) 655-0956

RECEIPT FOR OFFICIAL MAIL
[FILE STAMP]
JULY 7, 1994
HEALTH CLAIMS
ARBITRATION OFFICE

Daniels V. Greater Baltimore Medical
Center, et al, HCA No.: 93-0061

CERTIFICATION OF MAILING

I HEREBY CERTIFY that on this 5th day of July, 1994, a copy of the plaintiff Notice of Intent to Appeal, Notice of Action to Nullify and Notice of Rejection of The Award was mailed, Certified to Ms. Natashs S. Wesker, Esq., Mason, Ketterman & Morgan, attorneys Dr. Theodore, 300 East Lombard Street, Suite 100, Baltimore, Maryland 21202, Defendant's.

/S/ JAMES E. DANIELS
James E. Daniels, Proper Person

Copies to:

Mr. Harry Chase
Executive Director
Health Claims Arbitration Office
118 N. Charles Street
Suite 610
Baltimore, Maryland 21201

Mr. John Wheeler Glenn, Esquire
Panel Chairperson
Preston and Glenn, P.A.
The Law Building
425 St. Paul Place ar Franklin
Baltimore, Maryland 21202

Law Offices
Preston and Glenn
The Law Building
425 St. Paul Place at Franklin
Baltimore, Maryland 21202
(410) 685-1500

May 12, 1995

Mr. James E. Daniels
3558-T2 Carriage Hill Circle
Randallstown, Maryland 21133

RE: Daniels vs. GBMC
HCA#: 93-0061

Dear Mr. Daniels:

To confirm our telephone conversation on May 8, 1995, I am now forwarding to you a copy of your "Notice of Appeal" which was apparently received in my office on July 6, 1994.

Very truly yours,

/S/ [illegible]
John Wheeler Glenn

JWG/pab
Encl.

REGISTERED/CERTIFIED MAIL # p 414 718 297

ARTICLE ADDRESS TO:
MS. NATASH S. WESKER, ESQ.
MASON, KETTERMAN & MORGAN
300 EAST LOMBARD STREET-SUITE 1100
BALTIMORE, MARYLAND 21202

RECEIPT FOR OFFICIAL MAIL
[POSTAL SEAL]
RECEIVED
JULY 7, 1994
BALTIMORE, MD TOWSEN
FINANCE USPS

/s/ **[illegible]**

APPENDIX I

BEFORE THE HEALTH CLAIMS ARBITRATION
OFFICE OF MARYLAND

HAC NO. 93-0061

JAMES E. DANIELS,
CLAIMANT,
VS.
GREATER BALTIMORE MEDICAL CENTER, ET AL.,
HEALTH CARE PROVIDER.

AFFIDAVIT OF ROGER THEODORE, M.D.

I, Roger Theodore, M.D., do solemnly swear and affirm to the following:

1. I am licensed to practice medicine in the State of Maryland and have been so licensed since June, 1972.

2. I have been board-certified in surgery since 1974.

3. In 1989, Dr. Peter Stamas referred James Daniels to my practice.

4. After examining Mr. Daniels, I recommended that he undergo a hemorrhoidectomy which was performed at Greater Baltimore Medical Center on February 8, 1989.

5. Following the hemorrhoidectomy, I saw Mr. Daniels for post-operative care on May 18, 1989 and again on November 9, 1989.

6. On November 9, 1989, I noticed that Mr. Daniels had developed a large rectal skin tag and recommended that he have it removed under IV sedation.

7. Mr. Daniels agreed to the excision of the rectal skin tag during that office visit on November 9, 1989.

8. Upon completion of my examination, I spoke with my secretary, Suzanne Diamond, and asked her to schedule Mr. Daniels for the excision of a rectal skin tag which would take approximately forty-five (45) minutes.

9. The surgery was originally scheduled for Friday, November 17, 1989 but prior to that date, I was advised by Ms. Diamond that the procedure had been cancelled by Mr. Daniels.

10. I ultimately performed the procedure on February 12, 1990.

I DO SOLEMNLY DECLARE AND AFFIRM, UNDER THE PENALTIES OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

/S/ Roger Theodore, M.D.
Roger Theodore, M.D.

a:theodore.aff

BEFORE THE HEALTH CLAIMS ARBITRATION
OFFICE OF MARYLAND

HAC NO. 93-0061

JAMES E. DANIELS,
CLAIMANT,
VS.
GREATER BALTIMORE MEDICAL CENTER, ET AL.,
HEALTH CARE PROVIDER.

AFFIDAVIT OF SUZANNE DIAMOND

I, Suzanne Diamond, do solemnly swear and affirm to the following:

1. I have been the office manager for Dr. Roger Theodore for approximately four and one half years. In my capacity as the office manner, I am responsible for scheduling patients for both office visits and procedures which are to be performed in a hospital.

2. On November 9, 1989, I was asked by Dr. Theodore to schedule James Daniels for an excision of a rectal skin tag which would take approximately forth-five (45) minutes.

3. When asked by Dr. Theodore to schedule a procedure, it is my pattern and practice to first check Dr.

Theodore's calendar to determine his availability for scheduling. I then call Surgical Posting at Greater Baltimore Medical Center and request a time slot for use of the operating room. Generally, the patient is present while I am scheduling a procedure but on rare occasions, they are unable to remain at the office while the scheduling is being coordinated and on those occasions, I contact the patient on the same day to alert them as to the date and time that Dr. Theodore will perform the procedure.

4. This particular procedure, the forth-five (45) minute excision of a rectal skin tag was scheduled by me to be performed by Dr. Theodore on Friday, November 17, 1989 from 11:45 a.m.-12:30 p.m. It was scheduled as an outpatient procedure with IV sedation.

5. Prior to Friday, November 17, 1989, Mr. Daniels contacted the office and cancelled that appointment.

6. Although I have no independent recollection of the reason that Mr. Daniels cancelled the procedure, it would be highly unusual for me to wait approximately two months to reschedule a forty-five (45) minute rectal skin tag excision.

7. Generally speaking, the only reason that I would wait two months to reschedule such a procedure is if the patient specifically requested that I wait to hear back from him/her before rescheduling.

8. I received a telephone call on January 17, 1990 from Mr. Daniels to Dr. Theodore. The message from Mr. Daniels concerned the rescheduling of the rectal skin tag surgery which he wanted done on or around February 12, 1990.

9. Upon receiving this message, I rescheduled the procedure for the requested date, February 12, 1990.

I DO SOLEMNLY DECLARE AND AFFIRM, UNDER THE PENALTIES OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

/S/ SUZANNE DIAMOND
SUZANNE DIAMOND

a:diamond:aff